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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

KAISER FOUNDATION HEALTH PLAN,
INC., et al.,

Petitioners,

v.

THE SUPERIOR COURT OF
LOS ANGELES COUNTY,

Respondent;

LYNDA RAMSEY et al.,

Real Parties in Interest.

B215396

(Los Angeles County
Super. Ct. No. BC368605)

ORIGINAL PROCEEDINGS in mandate. John P. Shook, Judge. Petition granted.

Morrison & Foerster, Miriam A. Vogel, Linda E. Shostak, and James E. Boddy for Petitioners.

No appearance for Respondent.

Law Offices of Roxanne Huddleston, Roxanne Huddleston; Charles T. Mathews & Associates, Charles T. Mathews, and Benjamin Zeng for Real Parties in Interest.

In this writ of mandate proceeding, petitioners seek to overturn a March 5, 2009 order striking their answer, entering their default, and setting a default judgment prove-up hearing for their alleged violations of prior injunctive orders. We issued an alternative writ requiring the superior court either to: (1) vacate the order and deny the motion for terminating sanctions; or (2) show cause why a peremptory writ of mandate should not issue on the ground that an injunctive order is enforced by contempt proceedings and not by a terminating sanction. We now grant the petition and direct the superior court to vacate the order and deny the motion.

BACKGROUND

In this putative class action, real parties in interest Lynda Ramsey, Howard Riggs, Lorraine Guevara, Juliana Alpuerto, and Francis Schubert (collectively, plaintiffs) sued petitioners Kaiser Foundation Health Plan, Inc., Southern California Permanente Medical Group, and Kaiser Foundation Hospitals (collectively, Kaiser) for alleged wage and hour violations.

During discovery, plaintiffs filed two motions for terminating and/or issue sanctions based on Kaiser's alleged violations of separate court orders. In the first motion (the August 2008 motion), plaintiffs sought terminating and/or issue sanctions for Kaiser's alleged violations of an April 2008 discovery order requiring the disclosure of potential class members who were employed by Kaiser. In the second motion (the February 2009 motion), plaintiffs sought terminating and/or issue sanctions for Kaiser's alleged violations of the injunctive orders (a November 21, 2008 temporary restraining order and a December 19, 2008 preliminary injunction) prohibiting Kaiser from contacting potential class members "to offer settlement and/or secure releases" of their alleged claims. As previously stated, the March 5, 2009 order granting the February 2009 motion is the subject of this writ proceeding.

The trial court referred the August 2008 motion to a discovery referee. On December 30, 2008, the discovery referee signed a report, which recommended that the

trial court impose issue sanctions against Kaiser for its alleged violations of the April 2008 discovery order. Kaiser filed an objection with the referee on numerous grounds, including that the proposed issue sanctions would improperly preclude it from disputing either the certification of the class or the merits of the complaint. On January 27, 2009, the referee issued a revised report that reduced the scope of the recommended issue sanctions, such that Kaiser would no longer be precluded from disputing the merits of the complaint should the trial court adopt the referee's revised recommendations.

On March 5, 2009, which was prior to the entry of the court's ruling on the referee's recommendations, the trial court granted plaintiffs' February 2009 motion for terminating sanctions for Kaiser's alleged violations of the injunctive orders. In the March 5, 2009 order, the trial court concluded that Kaiser had violated the injunctive orders and, as a result, its answer was stricken and its default was entered. The trial court also set the matter for a default judgment prove-up hearing.

Before the default judgment prove-up hearing was held, plaintiffs decided not to seek a default judgment. On April 10, 2009, plaintiffs filed a motion seeking reconsideration, on the court's own initiative (given the expiration of the 10-day period for motions for reconsideration under Code Civ. Proc., § 1008), of the March 5, 2009 order granting terminating sanctions. Plaintiffs stated that because their complaint did not specify the amount of damages being demanded, any default judgment in excess of the court's jurisdictional limits would be void. (Citing *Greenup v. Rodman* (1986) 42 Cal.3d 822 and *Matera v. McLeod* (2006) 145 Cal.App.4th 44.) Plaintiffs stated that due to this "technicality," the "entry of default against Defendants [was] inappropriate under the circumstances of this case."

In the April 10, 2009 motion, plaintiffs requested that the trial court, on its own motion, vacate Kaiser's default and either: (1) impose the issue and evidentiary sanctions suggested by plaintiffs in their April 10 motion; or (2) impose the broader issue sanctions recommended in the referee's original report dated December 30, 2008, which would preclude Kaiser from disputing liability but not damages in the trial on the complaint.

On April 15, 2009, which was before any hearing was held on plaintiffs' April 10 motion for reconsideration, Kaiser filed the instant writ of mandate petition to overturn the March 5, 2009 order imposing terminating sanctions for its alleged violations of the injunctive orders.

On April 22, 2009, we issued an alternative writ of mandate requiring the superior court either to vacate the March 5, 2009 order and deny the February 2009 motion for sanctions, or show cause why a peremptory writ of mandate should not issue on the ground that Kaiser has demonstrated that an injunctive order is enforced by contempt proceedings and not by a terminating sanction.

On April 23, 2009, we were informed by defense counsel that plaintiffs had requested that the trial court not comply with the alternative writ by vacating Kaiser's default, so that plaintiffs could file a return to the instant petition. Defense counsel also provided an April 23, 2009 notice of ruling, which indicated that the superior court had granted this request and had stayed the April 10 motion for reconsideration while this writ of mandate proceeding is pending. On May 13, 2009, plaintiffs filed their return, which informed us of the trial court's May 4, 2009 order adopting and imposing the broader issue sanctions that were recommended in the discovery referee's initial December 30, 2008 report.

DISCUSSION

Kaiser contends that an injunctive order is enforced by contempt proceedings and not by a terminating sanction. We agree. (See Code Civ. Proc., § 1218; *Conn v. Superior Court* (1987) 196 Cal.App.3d 774, 784; Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2006) ¶ 9:711 et seq., pp. 9(II)-48.3-48.10.)

When the alleged violation of a court order occurs outside the presence of the judge, which is known as an "indirect" contempt, "[a]bsent some emergency, the affronted judge who prefers the charges should not sit in the contempt proceedings.

[Citation.]” (*Gates v. Municipal Court* (1992) 9 Cal.App.4th 45, 52; *Turkington v. Municipal Court* (1948) 85 Cal.App.2d 631, 635-636.) In this case, because Kaiser did nothing in the court’s immediate presence to warrant censure, “there is no question that the presiding judge should have disqualified himself” from determining whether Kaiser had violated the injunctive orders. (*Gates v. Municipal Court, supra*, 9 Cal.App.4th at p. 52.) “It is elementary that a party should not act as judge in his or her own case.” (*Ibid.*)

Although plaintiffs contend that the trial court was justified in granting a terminating sanction based on Kaiser’s violation of the discovery order, the alleged discovery violations were not the basis for the March 5, 2009 order. The alleged discovery violations were the subject of a separate motion, the August 15, 2008 motion, which was granted, according to exhibit C of plaintiffs’ return, on May 4, 2009. Accordingly, the record now clearly shows that the March 5, 2009 order could not have been based on the discovery violations that were the subject of the subsequent May 4, 2009 order.¹

The only remaining issue is whether Kaiser is entitled to extraordinary writ relief. “Generally, a writ will lie when there is no plain, speedy, and adequate alternative remedy; the respondent has a duty to perform; and the petitioner has a clear and beneficial right to performance. [Citations.]” (*Payne v. Superior Court* (1976) 17 Cal.3d 908, 925.) We conclude that all of the above conditions have been met in this case.

Plaintiffs argue that Kaiser has not suffered an irreparable injury and does not lack an adequate remedy at law. However, “[t]he unavailability of another adequate remedy was determined when we granted the alternative writ. [Citations.] And [Kaiser] clearly has both a right to and a beneficial interest in obtaining access to the courts” to defend itself against the complaint’s allegations. (*Payne v. Superior Court, supra*, 17 Cal.3d at

¹ Even if the record supported plaintiffs’ claim that the trial court issued its terminating sanctions in response to Kaiser’s alleged discovery violations, counsel conceded at oral argument that the sanctions were also based on Kaiser’s violation of the injunction.

p. 925.) Moreover, given the trial court's failure to grant Kaiser a contempt hearing before another bench officer for Kaiser's alleged violation of its injunctive orders, we are compelled to conclude that the trial court failed to perform its duty. We therefore find that the May 4, 2009 order imposing terminating sanctions was not a valid exercise of discretion, given that there was no proper exercise of discretion in the first instance. (See *ibid.*)

DISPOSITION

Let a peremptory writ of mandate issue, directing the superior court to vacate the ,March 5, 2009 order and to enter a new order denying the February 2009 motion. Kaiser shall recover its costs.

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SUZUKAWA, J.

We concur:

EPSTEIN, P.J.

WILLHITE, J.